IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 438. 438

ORDER OF RAILWAY CONDUCTORS OF AMERICA, an unincorporated association, *Petitioner.*

v.

SOUTHERN RAILWAY COMPANY, a corporation organized and existing under the laws of the State of Virginia.

On Writ of Certiorari to the Supreme Court of the State of South Carolina.

BRIEF FOR RESPONDENT.

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TABLE OF CONTENTS.

TABLE OF AUTHORITIES.

Cases.

STATUTES.

Page

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OPINIONS BELOW.

The first opinion of the Supreme Court of South Carolina in this case is reported in 210 S. C. 121, 41 S. E. (2d) 774, and is set forth in the record at pages 31-43. The second opinion has not yet been officially reported, but is reported in 54 S. E. (2d) 816, and is set forth in the record at pages 557-571.

JURISDICTION OF THIS COURT.

The final judgment and decree of the Supreme Court of South Carolina was entered August 15, 1949. Petition for writ of certiorari was filed October 29, 1949, and was granted on December 12, 1949, 94 L. Ed. (Adv.) 198, 70 Sup. Ct. 251. The jurisdiction of the Court was invoked under Section 1257(3) of Title 28, United States Code.

STATUTES INVOLVED.

This controversy involves the construction and application of the Railway Labor Act, 45 U. S. C., § 151 *et seq.*, as bearing on the jurisdiction of the courts of South Carolina under the Declaratory Judgment Act of that State, South Carolina Code, 1942, § 660. The provision of the Railway Labor Act especially pertinent here is § 3 First (i), 45 U. S. C., § 153 First (i), which reads:

> "The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

STATEMENT OF THE CASE.

This action was brought in the Court of Common Pleas for Charleston County, South Carolina, by respondent, an interstate railroad company, against petitioner, a railway labor organization which is the duly accredited representative of the conductors employed by respondent. The action was pursuant to the Declaratory Judgment Act, South

Carolina Code, 1942, § 660, and sought to obtain the construction of a written contract between petitioner and respondent.

The question presented by the complaint is whether industrial switching movements on an industry track at Pregnall, South Carolina, an intermediate point on plaintiff's line between Charleston and Branchville, South Carolina, are a part of the service trips of conductors of local freight trains between those points, as contended by respondent and held by the courts below; or whether, as contended by petitioner, the conductors are entitled to a full extra day's pay for performing this incidental and customary switching service (R. 1-2).

In addition to its answer, raising similar defenses, the petitioner filed a demurrer to the complaint based solely on the Railway Labor Act (45 U. S. C. § 151 *et seq.*) and which asserted that because the suit is one involving a dispute concerning the application and interpretation of a collective bargaining agreement between the parties, the Railway Labor Act provides the sole and exclusive means and procedure for settling such disputes and that consequently the dispute is not within the jurisdiction of the courts of South Carolina. The demurrer also was based on a contention that the court, in the exercise of its discretion, should not proceed to hear the case, but should defer to the remedy provided by the Railway Labor Act (R. 25-29). The trial court sustained the demurrer (R. 29-31), but the Supreme Court of South Carolina reversed the order in its opinion reported in 210 S. C. 121, 41 S. E. (2d) 774 (R. 31-43), holding that "the Railway Labor Act did not oust the courts of jurisdiction to interpret an agreement between a carrier and its employees, even where the dispute with respect to the agreement was one which, under the Act, might have been, but was not, submitted to the National Railroad Adjustment Board" (R. 38). The court below, in reversing the order sustaining the demurrer, relied on the decision in *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, as controlling.

Following the reversal, the case came on for trial in the Court of Common Pleas at Charleston, South Carolina, at which trial extensive evidence was introduced by both sides (R. 50-477). Thereafter, on August 30, 1947, the trial court filed its decree awarding plaintiff the declaratory judgment prayed in its complaint (R. 512-528). The facts established by the testimony are so fully reviewed in the trial court's decree that we deem it unnecessary to repeat them here. We respectfully ask the Court to look to the decree for a full statement of all the pertinent facts (R. 512-528), rather than to the argumentative analysis of the case set forth in petitioner's brief (Bf. pp. 4-11), with much of which we take issue, and the greater part of which relates to the merits, which are not before this Court for review.

Inasmuch as the petitioner mistakenly states (Bf. p. 11) that the dispute was still in negotiation at the time the action was begun, we point out that the record shows conclusively that the claim here asserted by respondent had been appealed to the highest officer of the carrier and had been formally rejected (R. 159-169, 321), and the trial court so found (R. 515). The record therefore shows that negotiations and conferences had been completed as contemplated by the Railway Labor Act, and nothing remained to be done, at the time this suit was filed, to enable the parties to submit the dispute to the courts or to the National Railroad Adjustment Board, as they, or either of them, might elect.

Moreover, as pointed out by the court below, it was shown by the testimony that the dispute was not submitted by petitioner to the Adjustment Board until after this suit was brought and answer had been filed by the defendant-petitioner (R. 557-558).

Petitioner in due course appealed from the final judgment of the trial court to the court below and again renewed its objections and exceptions under the Railway Labor Act (R. 529-535). The court below, again in a unanimous decision, affirmed the final judgment and decree for

the reasons stated by the trial court in its decree, which was ordered reported (R. 557-571).

COUNTERSTATEMENT OF QUESTION PRESENTED.

Although petitioner states the question presented in seven different ways (Bf. p. 17), the only substantial issue involved is whether the court below correctly applied the decision in *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, when it held:

> "that the Railway Labor Act did not oust the courts of jurisdiction to interpret an agreement between a carrier and its employees, even where the dispute with respect to the agreement was one which, under the Act, might have been, but was not, submitted to the National Railroad Adjustment Board. * * *" (R. 38)

SUMMARY OF ARGUMENT.

The only question before this Court for review, namely, whether the Railway Labor Act precludes the South Carolina courts from taking jurisdiction of this suit brought under the provisions of the State Declaratory Judgment Act, was properly decided by the court below when it held it had jurisdiction notwithstanding the alternative and cumulative remedy provided by the processes of the National Railroad Adjustment Board because, as will be shown in the following argument:

1. The decision in the case of *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, expressly held that the Railway Labor Act does not exclude the exercise of jurisdiction by the ordinary judicial courts in suits for the enforcement of contracts respecting rules and working conditions of railroad employees as embodied in collective bargaining agreements.

2. The *Moore Case* still stands as the governing authority in this case, since it has not been overruled or modified by the decision in *Order of Railway Conductors* v. *Pitney*, 326 U. S. 561 or any other subsequent decisions of this Court.

3. The so-called doctrine of "Primary Jurisdiction" has no valid application to Adjustment Board procedure, and does not require that the *Moore Case* be overruled.

4. The legislative history of the Railway Labor Act confirms and supports the decision in the *Moore Case*, and shows that Congress did not intend by the creation of the Adjustment Board to effect the complete and radical change in the character and legal effect of the adjustment procedure for handling railway labor disputes which petitioner here contends for.

5. The decree of the South Carolina court leaves petitioner free to enjoy all its rights and immunities guaranteed and contemplated by the Railway Labor Act.

ARGUMENT.

I. That the Railway Labor Act Does Not Exclude the Exercise of Jurisdiction by the Ordinary Judicial Courts for the Enforcement of Contracts Respecting Rules and Working Conditions Was Definitely Decided by This Court in the Moore Case.

Even prior to the decision of this Court in *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, it was generally held by the decided cases that, since the enactment of the Railway Labor Act, and in spite of the provisions thereof establishing a statutory adjustment procedure, parties to railroad collective bargaining agreements might resort to the ordinary judicial courts for the enforcement of contracts between them respecting rules and working conditions, either by actions for damages or by bill for an injunction or declaratory judgment.[1]

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[1] Among such cases are the following:

Louisville & N. R. Co. v. *Bryant*, 263 Ky. 578, 92 S. W. (2d) 749

Florestano v. *Northern Pacific Ry. Co.*, 198 Minn. 203, 269 N. W. 407.

McCrory v. *Kurn*, 101 S. W. (2d) 114 (Mo. App.)

That the Railway Labor Act did not oust the jurisdiction of the courts to interpret and enforce an agreement between a carrier and its employees, even where the dispute with respect to the agreement was one which, under the Act, might have been, but had not been, submitted to the National Railroad Adjustment Board, was clearly determined in *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630.

The *Moore Case* involved a suit for damages brought by a member of the Brotherhood of Railroad Trainmen against the railroad company based on an alleged wrongful discharge contrary to the terms of the contract between the railroad and the Brotherhood, federal jurisdiction being based on diversity of citizenship. In holding that the plaintiff need not seek an adjustment of the controversy as provided in the Railway Labor Act as a prerequisite to bringing an action in the ordinary courts, this Court said (312 U. S. 634-635):

> "* * * But we find nothing in that Act which purports to take away from the courts the jurisdiction to determine a controversy over a wrongful discharge or to make an administrative finding a prerequisite to filing a suit in court. * * * It is to be noted that the section pointed out, § 153(i), as amended in 1934, provides no more than that disputes 'may be referred . . . to the . . . Adjustment Board . . .'. It is significant that the comparable section of the 1926 Railway Labor Act (44 Stat. 577, 578) had, before the 1934 amendment, provided that upon failure of the parties to reach an adjustment a 'dispute shall be referred to the designated Adjustment Board by the parties, or by either party . . .' This difference in language, substituting 'may'

McGee v. *St. Joseph Belt Railway Co.*, 232 Mo. App. 639, 110 S. W. (2d) 389

Evans v. *Louisville and Nashville R. R. Co.*, 191 Ga. 395, 12 S. E. (2d) 611

Dooley v. *Lehigh Valley R. Co.*, 130 N. J. Eq. 75, 21 Atl. (2d) 334

Perras v. *Terminal R. Ass'n. of St. Louis*, 154 S. W. (2d) 417, (St. Louis Ct. of App.)

Nord v. *Griffin*, 86 F. (2d) 481 (C. C. A., 7th), cert. den., 300 U. S. 673.

for 'shall', was not we think, an indication of a change in policy, but was instead a clarification of the law's original purpose. For neither the original 1926 Act, nor the Act as amended in 1934, indicates that the machinery provided for settling disputes was based on a philosophy of legal compulsion. On the contrary, the legislative history of the Railway Labor Act shows a consistent purpose on the part of Congress to establish and maintain a system for peaceful adjustment and mediation voluntary in its nature. The District Court and the Circuit Court of Appeals properly decided that petitioner was not required by the Railway Labor Act to seek adjustment of his controversy with the railroad as a prerequisite to suit for wrongful discharge. • • •"

The decision in the *Moore Case* has never been questioned by this Court or modified in any respect. It was followed in *Washington Terminal Co.* v. *Boswell*, 124 F. (2d) 235, affirmed 319 U. S. 732, where Associate Justice Rutledge writing for the United States Court of Appeals for the District of Columbia said:

"• • • The decision [Moore v. Illinois Central R. Co., 312 U. S. 630] establishes that in such circumstances the Act has neither excluded the general jurisdiction of the courts nor made exhaustion of the administrative remedy prerequisite to its exercise, for decision of controversies which might be determined by the statutory method. At the threshold of controversy accordingly, the disputants have alternate routes which they may follow. One is entirely judicial, without regard to the Railway Labor Act. The other is administrative and judicial, according to its terms." (p. 238).

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"The foregoing considerations are reinforced by the fact that the carrier, under the decision in *Moore* v. *Illinois R. R., supra*, can bring its suit on the contract, independently of the statute, prior to the time when the dispute is submitted to the Board. Until then, at least, it has its election to pursue the exclusively judicial remedy or to follow the administrative and judicial one provided by the Railway Labor Act. • • •" (p. 249).

Washington Terminal Co. v. Boswell, supra, was an action for a declaratory judgment brought by the railroad employer just as is the case here. The court did not hold that the form of action was not proper or that the action could not be brought by any party to the dispute. The ground of dismissal was that the dispute had already been submitted to the Adjustment Board prior to the institution of the suit. Here, however, the record is clear that the jurisdiction of the South Carolina courts had been invoked by the respondent months before the petitioner sought to submit the dispute to the Adjustment Board. (R. 558) It is thus seen that the South Carolina courts have decided this case in complete accord with the *Moore* and *Boswell* cases, of which the South Carolina Supreme Court said in its first opinion (R. 39-40):

> "In view of these decisions, it is our opinion that the Congress intended that controversies of the character set forth in this case may be adjusted in either of two ways: First, under the authority of the Act by submitting the dispute to the National Railroad Adjustment Board; or, second, by exercising the common law rights of any party to bring an action to construe a contract and have his rights declared. There is concurrent jurisdiction of the subject-matter of a suit of this kind, either by a court of competent jurisdiction or by the National Railroad Adjustment Board."

Notwithstanding the clear language to the contrary used in the opinion of the Court in the *Moore Case*, petitioner argues (Bf. pp. 43-52) that the *Moore Case* can be distinguished from the present case on two grounds.

The first ground on which petitioner seeks to distinguish the *Moore Case* is that because it was an action to recover damages for wrongful discharge, "the relief sought by Moore in the exercise of his *individual* right was not in direct conflict with the provisions and procedures provided in the Railway Labor Act" (Bf. p. 46).

But Moore's right to employment depended solely upon his contract of employment, which basically includes the

collective bargaining contract covering his class. (See *Illinois Central R. Co.* v. *Moore*, 112 F. (2d) 959,965). Unless that contract was violated, the discharge was not unlawful. Petitioner regularly files claims with the carriers claiming that employees have been discharged in violation of collective bargaining contracts. Obviously these are the basic types of cases that are specifically referable to the Adjustment Board under Section 3, First (i) of the Railway Labor Act which provides that disputes between an employee (singular) and a carrier "growing out of grievances or out of the interpretation or application of agreements • • • may be referred by petition" to the Adjustment Board. Thus this argument of petitioner falls, for there is hardly a claim filed for which an employee could not fall back on his common law rights and sue for damages rather than seek the limited type of relief awarded by the Adjustment Board for violation of contract rights and in disposing of grievances. This clearly was the view of the Tenth Circuit Court of Appeals in the recent case of *Beeler* v. *Chicago, R. I. & P. Ry. Co.*, 169 F. (2d) 557, cert. den., 335 U. S. 903, where it was said:

> "If appellant's employment comes within the bargaining contract invoked, no one questions his right to maintain an action for damages for the breach thereof. See Moore v. Illinois Cent. R. Co., 312 U. S. 630; Union Pac. R. Co. v. Olive, 9 Cir., 156 F. (2d) 737." (p. 559).

The second ground urged by petitioner for distinguishing this case from the *Moore* decision is based on the theory that there is a difference between a suit brought by an individual employee against the carrier and one between the carrier and an organization. The gist of the argument is that while the language used by the Court in the *Moore Case* was applicable to the situation there before the Court, it was not intended to be applicable to a suit between a rail carrier and the representative of its employees concerning interpretation of a collective bargaining agreement, the

subject-matter of which is within the jurisdiction of the Adjustment Board.

But this argument of petitioner overlooks the status of a collective bargaining agent, such as the petitioner in the case at bar, in the handling of claims of employees under the applicable contract in negotiations and when submitted to the Adjustment Board. For in *Elgin, Joliet and Eastern R. Co.* v. *Burley*, 325 U. S. 711 (in which the *Moore Case* is cited at page 720) and 327 U. S. 661, it was held that the collective bargaining agent could act in the handling of claims under the applicable contract only to the extent authorized by the individual employees involved and could bind them only to that extent. It necessarily follows that petitioner, as a representative of conductor employees, is in no different position with respect to the election of remedies than was the individual employee involved in the *Moore Case*.

Under petitioner's theory, an employee or group of employees, has an election of remedies in any case involving the interpretation of a collective bargaining contract, that is, by pursuing the common law remedy in the courts or by submitting the claims to the Adjustment Board. On the other hand, petitioner says that the Railway Labor Act took away the employer's right to submit such disputes to the courts to enforce its common law rights under the contract. There is nothing whatsoever in the Railway Labor Act to support a contention that Congress so intended to take the common law remedies away from either the employer or the employee, much less any basis for imputing to Congress a purpose to take the right away from one and not the other.

The case of *Shipley* v. *Pittsburgh & L. E. R. Co.*, (D. C. W. D. Pa.) 83 F. Supp. 722, illustrates the fallacy of petitioner's argument. There the suit was brought by a large group of railroad employees claiming damages for breach of contract by the railroad defendant because they had been required to do certain work which they claimed was not

proper for their assignment under the collective bargaining contract. The damages claimed were for an extra day's pay. Thus, the type of issue was exactly the same as in the case now before this Court, except that the parties were reversed. There, as here, the dispute was one which could have been, but had not been, submitted to the Adjustment Board, because the plaintiff employees preferred to use the remedy provided by the judicial courts. In a carefully considered opinion rendered March 8, 1949, the court held that it had jurisdiction notwithstanding the remedy before the Adjustment Board, and, after interpreting the contract, made the necessary findings to dispose of the case.

Under petitioner's contention, employees would have a choice of remedies, but the employer would be limited to the administrative remedy. If, as in the *Shipley Case, supra,* a group of employees has a right to invoke the court's jurisdiction to interpret the collective contract, plain justice and equity demand an equal right for the railroad employer. Otherwise, gross discrimination results. Moreover, to bar the employer from the courts, the Court would have to read into the Railway Labor Act a prohibition not necessary to carry out the purpose of Congress and not supported by the legislative history, as will be shown later. Obviously, there is no basis for a contention that the employer is barred from the courts because Congress intended an exclusive administrative remedy to be used when it is admitted that the employees can freely by-pass the administrative remedy.

Section 3, First (i) of the Act places all parties on an equal basis with respect to disputes involving interpretation of collective bargaining contracts. It provides that disputes "between an employee or group of employees and a carrier or carriers * * * shall be handled in the usual manner * * *; but, failing to reach an adjustment * * * may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board * * *". This language is permissive in the case of both an employee

and an employer. There is not a word to indicate that a different purpose was intended in the case of either employee or employer. There simply is no basis for interpreting the Railway Labor Act as requiring a discrimination against the railroad employer in the handling of these disputes by making the administrative remedy exclusive in its case, but not in the case of the employees.

The respondent respectfully submits that the petitioner has failed to show that the South Carolina decision has misapplied the ruling of the Court in the *Moore Case*.

II. The Moore Case Still Stands as the Governing Authority in This Case.

The soundness of the *Moore Case, supra*, has been consistently recognized by the courts, and it establishes a carrier's right to invoke the jurisdiction of the courts to interpret and apply its contract unless the administrative machinery provided in the Railway Labor Act has been previously invoked.[2]

Notwithstanding this settled course of adjudication, petitioner contends that this Court in effect overruled the *Moore Case*, or at least greatly modified its application to suits brought by individual employees for damages, by its decisions in the cases of *General Committee, etc.* v. *Missouri-Kansas-Texas R. Co.*, 320 U. S. 323; *Switchmen's*

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[2] See for example, *Adams* v. *New York C. & St. L. R. Co.*, 121 F. (2d) 808, (C. C. A. 7th); *Oil Workers Inter. Union, etc.* v. *Texoma Gas Co.*, 146 F. (2d) 62, (C. C. A. 5th,) cert. den. 324 U. S. 872, rehearing den., 325 U. S. 893; *Berryman* v. *Pullman Co.*, 48 F. Supp. 542 (D. C. W. D. Mo.); *Austin* v. *Southern Pac. Co.*, (Cal.), 50 C. A. (2d) 292, 123 P. (2d) 39; *Watson* v. *Missouri-Kansas-Texas R. Co. of Texas* (Tex. Civ. App.), 173 S. W. (2d) 357; *Texas and New Orleans R. Co* v. *McCombs* (Tex.), 183 S. W. (2d) 716; *Evans* v. *Louisville and Nashville R. Co.*, 191 Ga. 395, 12 S. E. (2d) 611; *Wooldridge* v. *Denver and Rio Grande Western R. Co.*, 118 Colo. 25, 191 P. (2d) 882, *Beeler* v. *Chicago, Rock Island and Pacific Ry. Co.*, 169 F. (2d) 557, (C. C. A. 10th.); *Kordewick* v. *Indiana Harbor Belt R. Co.*, 157 F. (2d) 753, (C. C. A. 7th.); and *Shipley* v. *Pittsburgh & L. E. R. Co.*, 83 F Supp. 722 (D. C. W. D. Pa.)

Union v. *National Mediation Board*, 320 U. S. 297; *General Committee, etc.* v. *Southern Pacific Co.*, 320 U. S. 338; *Brotherhood of Railroad Trainmen* v. *Toledo, P. & W. R.*, 321 U. S. 50; *Steele* v. *Louisville and Nashville R. Co.*, 323 U. S. 192; and *Order of Railway Conductors* v. *Pitney*, 326 U. S. 561.

All of these cases are, however, clearly distinguishable and none of them affords any reason for departing from the sound law previously declared in the *Moore Case*, which was not mentioned by the Court in the opinions in any of the six cases relied on by petitioner.

All of these cases except the *Pitney Case* involved efforts of the plaintiffs to enforce substantive rights created by the Railway Labor Act. The first three were decided by the Court on November 22, 1943, and involved the designation or selection of collective bargaining representatives and the negotiation of changes in collective agreements, which are established as statutory rights by the Railway Labor Act, and were not based on any common law rights theretofore enforceable in the courts. In view of definite administrative procedures provided in the Act for selecting collective bargaining representatives and for changing collective agreements, this Court held that the statutory procedures are mandatory and resort to the courts is foreclosed. *General Committee, etc.* v. *Missouri-Kansas-Texas*, 320 U. S. 323; *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297; *General Committee, etc.* v. *Southern Pacific Co.*, 320 U. S. 338. The result so reached was merely an application of the well-settled doctrine that where a statute creates a new right and establishes a remedy for its enforcement, that remedy will be deemed the exclusive remedy for enforcement of the new right, unless the statute expressly provides otherwise; or, as it was tersely phrased in *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297, 301, "in such a case the specification of one remedy normally excludes another."

But those cases, and that doctrine, have no application where the right sought to be enforced is not one created by the statute. In such a case the administrative remedy created by the statute is merely cumulative to the existing legal remedies. Such is the present case. The Railway Labor Act established a new remedy, or adjustment procedure, for enforcement of collective bargaining agreements between carriers and their employees, by providing that such "disputes *may* be referred" to the National Railroad Adjustment Board.[3] The deliberate use of the permissive "may" shows that Congress itself was advertent to the principles just discussed.

The Railway Labor Act did not create the substantive rights of the parties to collective bargaining contracts between carriers and their employees. Those rights are simple common law rights *ex contractu*, and they are no different now from what they were before enactment of the Railway Labor Act. This of course is the reason the courts without exception have held that an action on a collective bargaining contract is not one that "arises under the * * * laws * * * of the United States" within the meaning of Title 28, § 1331, U. S. Code.[4]

It is clear, therefore, that the three decisions in 320 U. S., involving representation of employees and the making of new contracts between carriers and their employees—matters which involve new substantive rights created by the Railway Labor Act—have no application whatever to a controversy involving the construction of an existing collective bargaining agreement, itself creating its own substantive rights under State law, such as existed in the *Moore Case* and exists in the case at bar.

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[3] All emphasis in this brief ours unless otherwise indicated.

[4] *Lane* v. *Union Terminal Co.*, (N. D. Texas) 12 F. Supp. 204; *McDermott* v. *New York Central R. Co.*, (S. D. N. Y.) 32 F. Supp. 873; *Swartz* v. *Gardner*, (W. D. N. Y.) 44 F. Supp. 447; *Strauser* v. *Reading Co.* (D. C. E. D. Pa.) 80 F. Supp. 455; *Burke* v. *Union Pacific R. Co.*, (C. C. A. 10) 129 F. (2d) 844; *Barnhart* v. *Western Maryland R. Co.* (C. C. A. 4) 128 F. (2d) 709.

The decision in *Trainmen* v. *Toledo, P. & W. R.*, 321 U. S. 50, turned on a still narrower point not even remotely analogous to the issue in the *Moore Case*. There the question was whether the District Court properly issued an injunction which restrained the railroad's employees from interfering by violence with its property and interstate railroad operations. As stated in the Court's opinion "the sole issues that concern us are the existence of federal jurisdiction and whether the requirements of the Norris-LaGuardia Act (29 U. S. C. §§ 107, 108, 47 Stat. 71, 72) were satisfied." The court held that the mandatory requirements of the Norris-LaGuardia Act were not complied with for failure of complainant to make every reasonable effort to settle the dispute, and hence the courts lacked jurisdiction to grant an injunction. Of course, in the case now before the Court, there is no statutory requirement such as is provided in the Norris-LaGuardia Act to be met as a condition precedent to invoking the jurisdiction of the courts.

Steele v. *Louisville and Nashville R. Co.*, 323 U. S. 192, unlike the case just discussed, was one in which the Court held that the courts have jurisdiction to consider a suit for breach of the duty of a duly authorized union representative under the Railway Labor Act to represent minority groups of employees without discrimination. As pointed out by the Court there is no administrative agency provided by the Act to afford relief in such cases. Insofar as the Adjustment Board procedure was concerned, the Court said there was no issue over the interpretation of the contracts so there was no need to decide the question of the necessity of exhausting that procedure.[5] Again, as in the

[5] The Court did say that even though the dispute were to be heard by the Adjustment Board, that Board could not give the relief sought to stop the alleged discrimination by the union. Care was taken, however, to point out that by referring to the failure of the Adjustment Board to consider some 400 cases involving complaints by individual members of a craft represented by a labor organization the Court was not to be considered as holding that there is no judicial power to require the Adjustment Board to consider such cases. (See 323 U. S. at 205-206).

other cases cited by the petitioner, not even a suggestion that the Court intended to overrule the *Moore Case* can be found in the *Steele Case* or in its companion case *Tunstall* v. *Brotherhood*, 323 U. S. 210, decided the same day.

Finally, the petitioner places main reliance on the decision in *Order of Railway Conductors* v. *Pitney*, 326 U. S. 561. That case involved the question of the extent to which a federal district court having charge of a railroad reorganization has power to adjudicate a dispute involving the railroad and two employee-accredited bargaining agents, in view of the provisions of the Railway Labor Act giving such power to the administrative agencies established thereunder. The dispute there arose as to whether the yard conductors represented by the Trainmen's Union or the road conductors represented by the Conductors' Union should operate certain trains within a yard. The district court had to act in a dual capacity because it had administrative charge of the railroad in bankruptcy. It first had to instruct its Trustees how to proceed and in so doing was obliged to interpret the union agreements. The conductors claimed that the work in question could not be taken from them and given to the trainmen without negotiating the work out of their contract and asked the court to enjoin such transfer of work unless such contract was changed by the method prescribed by the Railway Labor Act. The district court, therefore, had to determine whether there was any clear violation of a right given by Congress and in determining that question had to interpret judicially the conductors' agreement to determine whether it gave the conductors the work. If it did not, no negotiation of a new agreement was necessary. This Court held that the district court properly proceeded to interpret the agreement insofar as instructing its Trustees was concerned, but that it should have refrained *in its discretion* from interpreting the contracts as a basis for injunctive relief, in order to give the parties the opportunity to have the contracts interpreted by the Adjustment Board.

The important and controlling point, it appears, was the fact that the court had to interpret the contracts in two capacities, in the first of which it was identified with one of the parties to the dispute, so as to make it proper and desirable that it should pass the question to another tribunal for determination as between the parties, especially since Section 77 (n) of the Bankruptcy Act provides that "No judge or trustee acting under this Act shall change the wages or working conditions of railroad employees except in the manner prescribed" in the Railway Labor Act, 11 U. S. C. § 205 (n).

The *Pitney* decision does not hold that the matter was not justiciable. It does not deny to the courts the power to interpret contracts, but states only that under the peculiar circumstances present in that case the court of equity should as a matter of discretion stay its hand. Furthermore, the case was essentially one concerning the alteration of an existing contract, a case on the mediation rather than on the adjustment side of the statute. The suit was one for an injunction to prevent what was claimed to be a clear violation of a right given by the statute, not the contract, i.e., that the existing agreement be changed only in the manner prescribed by the Act.

There is nothing in the *Pitney Case* which interferes with the jurisdiction of the state courts in the present proceeding under the State Declaratory Judgment Act. There is no suggestion that this case involves a complicated dispute such as was present in the *Pitney Case* any more than did the *Moore Case*. Here it is a simple controversy over the interpretation of a contract between the petitioner and the respondent as to whether conductors will be paid an extra day's pay for work performed on their regular tour of duty on the industrial track serving the Ancor Corporation at Pregnall, South Carolina.

There are strong reasons inherent in the Railway Labor Act to support the rationale of the decision in *Moore v. Illinois Central*. An examination of the Act clearly shows

that a decision by the Adjustment Board under the Act is not final, binding, or conclusive. Such a decision is not self-executing and can not be enforced save by a suit in a court of competent jurisdiction in which all the issues are tried *de novo*. It was, therefore, with good reason that Congress made resort to the Adjustment Board in a case like that at bar permissive rather mandatory. It is indeed difficult to believe that if the Court, in its opinion in the *Pitney Case*, had intended to reject its previous interpretation of the Railway Labor Act in the *Moore Case*, it would not have said so.

The petitioner's contention to the contrary is effectively and accurately answered in the following excerpt from the opinion of the South Carolina Supreme Court in this case (R. 40-41):

> "The *Pitney Case* involved primarily a suit for an injunction, and was complicated by the dual function of the court—first, as a court required to direct the receivers how to conduct the business of the railroad; and, second, as a court of equity required to determine if an injunction should issue to enjoin the receivers from violating Section 6 of the Railway Labor Act. The case was further complicated by a jurisdictional dispute requiring the interpretation of two collective bargaining agreements, which it was alleged, overlapped.
>
> "None of these conflicting features is present in the case now under consideration. In this case there is only one defendant, one contract, and one set of facts requiring the attention of the court in construing the agreement and disposing of the dispute. It might further be noted that the Supreme Court in the *Pitney case* did not hold that the Federal Court did not have jurisdiction. It merely held that in consideration of the complicated features of the case, the court should retain jurisdiction to stay action on the prayer for injunction in order to permit the parties to first have the two contracts interpreted by the administrative procedure provided in the Railway Labor Act.' Nowhere in the opinion of the court do we find any reference made to the case of *Moore* v. *Illinois Central R. Co.*, *supra*.

If it had been the intention of the court to overrule the *Moore Case* which was decided in 1941, we think this would have been done in specific language."

It is submitted that the decision in *Moore* v. *Illinois Central R. Co., supra*, still stands as the governing authority in this case, and fully supports the judgment of the court below in taking jurisdiction under the South Carolina declaratory judgment statute, notwithstanding the alternative, cumulative and concurrent administrative remedy provided by the Railway Labor Act.

III. The So-Called Doctrine of "Primary Jurisdiction" Has No Valid Application to Adjustment Board Procedure, and Does Not Require That the Moore Case Should Be Overruled or Modified.

As we have shown above, the decision in the *Pitney Case* was based on the complicated situation arising out of the dual capacity in which the district court had to act due to its having administrative supervision of the railroad under the Bankruptcy Act in addition to its judicial functions. Obviously the Court's discussion of the remedies provided by the Railway Labor Act was for the purpose of showing the availability of a reasonable remedy which the district court could require the parties to exhaust prior to the exercise of its discretionary equitable powers. Nowhere in the opinion is it suggested that the Court intended to hold that the rule of primary jurisdiction should apply to all cases referable to the Adjustment Board. To infer such a result seems unreasonable since the Court did not even mention its earlier opinion in the *Moore Case* in which it said that an employee "was not required by the Railway Labor Act to seek adjustment of his controversy with the railroad as a prerequisite to suit for wrongful discharge." (312 U. S. at page 636).

Petitioner, however, continues to urge that the rule of primary jurisdiction should be applied to the Adjustment

Board just as it is to the Interstate Commerce Commission under the decisions in *Great Northern Ry. Co.* v. *Merchants Elevator Co.*, 259 U. S. 285, and *Mitchell Coal and Coke Co.* v. *Pennsylvania R. Co.*, 230 U. S. 247. A complete answer to this contention of petitioner would seem to be the fact that the *Moore* and *Boswell cases, supra*, were decided by the Supreme Court subsequent to those cases. None of the cases cited by petitioner holds that the Adjustment Board has primary jurisdiction of cases referable to it, and as we will show below the principle of those cases is not applicable here.

This doctrine to which appeal is made for the purpose of overruling the *Moore Case*, originated in *Texas & Pac. Ry.* v. *Abilene Cotton Oil Co.*, 204 U. S. 426. In that case a shipper, without complaining to the Interstate Commerce Commission, brought suit in the courts against a carrier to recover for the payment of an allegedly excessive and unreasonable rate. The rate in question was in fact published in a tariff which the carrier had filed with the Commission, as required by the Interstate Commerce Act, and from which the carrier was not lawfully permitted to deviate. The question was whether, under these circumstances, the shipper was entitled to the judgment of a court as to the reasonableness of the rate or whether, under the Act, it was necessary that he should proceed through the Commission. He claimed that his right to proceed through the courts in the first instance was a common law right of which the statute should not be construed to deprive him. In approaching that contention this Court, speaking through Mr. Justice White, said (204 U. S. at p. 437):

> "A statute will not be construed as taking away a common law right existing at the date of its enactment, unless that result is imperatively required; that is to say, unless it be found that the pre-existing right is so repugnant to the statute that the survival of such right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory."

The Court, therefore, proceeded to examine what would be the effect of the exercise of the right claimed by the shipper under the circumstances of the particular case, and went on to say (204 U. S. at p. 440):

> "* * * for if, without previous action by the Commission, power might be exerted by courts and juries generally to determine the reasonableness of an established rate, it would follow that unless all courts reached an identical conclusion a uniform standard of rates in the future would be impossible, as the standard would fluctuate and vary, dependent upon the divergent conclusions reached as to reasonableness by the various courts called upon to consider the subject as an original question. Indeed, the recognition of such a right is wholly inconsistent with the administrative power conferred upon the Commission and with the duty, *which the statute casts upon that body*, of seeing to it that the statutory requirement as to uniformity and equality of rates is observed."

In other words, in view of the statutory requirement of uniform rates and in view of the fact that the Commission was the body charged by the statute with protecting and preserving rates in accordance with that statutory requirement, it followed necessarily that any procedure which defeated the power of the Commission to maintain the required uniformity of rates would render the statutory mandate nugatory. Hence, it was held that a right to proceed in the courts in disregard of the procedure through the Commission was necessarily inconsistent with the provisions of the statute.

The ruling was not to the effect that merely because there was an available procedure through an administrative body that procedure must be used to the exclusion of the procedure through the courts; it was only to the effect that where the procedure through the courts, rather than through the administrative body, would have some specific result in rendering nugatory a provision of the Act, like that which required uniformity of rates, the administrative procedure

would to that extent be held to oust the jurisdiction of the courts.

It therefore seems clear that the primary jurisdiction doctrine is not in any sense a doctrine of general application to administrative bodies as such, but applies only where special reasons exist with respect to the functions and nature of the particular administrative body.

The doctrine of the *Abilene Oil Case* has not been held to require that the courts should be ousted of jurisdiction generally over all controversies which may be brought before the Interstate Commerce Commission. In every case in which it has been applied, the ground for its application has been fundamentally that stated by Mr. Justice White in the passage above quoted, namely, the need for protecting the Commission in the performance of its statutory obligation to maintain proper rate levels and to eliminate discrimination in rates and practices by insuring uniformity. That this requirement of consistency and uniformity in the application of statutory standards is the basis of the doctrine is shown, for example, in the opinion written by Mr. Justice Brandeis for this Court in *Great Northern Railway* v. *Merchants Elevator Co.*, 259 U. S. 285, where he said (at page 291):

> "Whenever a rate, rule or practice is attacked as unreasonable or as unjustly discriminatory, there must be preliminary resort to the Commission. * * * It is required because the enquiry is essentially one of fact and of discretion in technical matters; *and uniformity can be secured only if its determination is left to the Commission.*"

Clearly, the reason stated in the cases cited above, and particularly in the *Merchants Elevator Case*, as the basis for the doctrine of primary jurisdiction has no application in the present case, because the body to which it is claimed in this case that preliminary resort must be had, *viz.*, the Adjustment Board, is not, as is the Interstate Commerce Commission, for example, an administrative or regulatory

or quasi-judicial tribunal charged with the maintenance of a statutory standard, such as the uniform maintenance of railroad rates, which would be impaired by the exercise of court jurisdiction without prior resort to the administrative tribunal.

The history and development of the powers of the Interstate Commerce Commission has been one of continuously granting more and more power to the Commission to assure uniformity in the treatment of shippers and the public all over the country with respect to the charges and practices of railroads. It is clear that Congress intended, by the Interstate Commerce Act, that the Commission should have complete control over the rates and charges made by the carriers, and, unless its primary power over matters of reasonableness and discrimination depending necessarily on technical and controversial facts be recognized and preserved, the very purpose of Congress would be defeated.

The interpretation of railroad labor contracts presents a very different problem. Congress, by passing the Railway Labor Act, did not establish a policy of providing uniformity in the collective bargaining agreements; on the contrary, its policy is declared to be to provide for free collective bargaining and the prompt and orderly settlement of disputes (45 U. S. C. § 151a). Such free collective bargaining between hundreds of carriers and their employees necessarily leads to a wide disparity between contracts, not to uniformity. To this end Congress provided two separate, distinct and different procedures. The first was the process of negotiation, mediation and fact-finding to cover disputes as to representation and the negotiation of changes in collective agreements. This procedure is mandatory and resort to the courts is foreclosed. *General Committee etc.* v. *Missouri-Kansas-Texas R. Co.*, 320 U. S. 323; *Switchmen's Union* v. *National Mediation Board*, 320 U. S. 297; *General Committee etc.* v. *Southern Pacific Co.*, 320 U. S. 338.

But for disputes involving the interpretation of existing collective bargaining agreements, Congress provided an

"adjustment" procedure to which the parties might submit their disputes. As we have pointed out above, this Court has never held that this was to be an exclusive procedure. Likewise, it is clear that there was no intention that the administrative procedure was for the purpose of securing uniformity. Congress spoke freely of its purpose to promote collective bargaining on every railroad, thereby preserving and encouraging the making of contracts with widely differing terms to meet the desires and needs of the employees and the carriers all over the country. There are hundreds of such contracts, each of which applies to a class of employees on a different carrier. The Adjustment Board could not achieve uniformity and still preserve the rights of the employees to negotiate and collectively agree with the carriers on their working conditions. In fact, the Board would go beyond the limits of its jurisdiction if it sought to achieve uniformity of conditions all over the country. (45 U. S. C. § 153 First (i)). It is thus seen that the purpose of the Adjustment Board procedure is the very antithesis of the uniformity which is the very heart and core of the Interstate Commerce Act.

Indeed, the National Railroad Adjustment Board is in no sense a regulatory body or quasi-judicial tribunal. It is simply an extremely informal body which makes decisions or awards, often through an outside referee who is not an "expert,"[6] in controversies growing out of the interpretation of contracts. It has no statutory provisions to police and no statutory standards to apply. It is not charged with the duty of maintaining any uniformity of rates or practices or rules or working conditions. And finally, its decisions or awards are enforceable only by a suit brought in the courts where there is a trial *de novo* even as to the facts. (45 U. S. C. § 153 First (p)).

[6] In its Fifteenth Annual Report to Congress submitted November 1, 1949, the National Mediation Board said: "Under the present system, there is a constant flow of new men serving as referees, none of whom under the law, can be associated with railroads or organizations, and hence their familiarity with labor practices in the railroad industry is necessarily limited." (p. 13)

The fundamental difference between the National Railroad Adjustment Board and administrative tribunals charged with the maintenance of statutory standards in the regulation of a particular field of activity was recognized by this Court in *Terminal Railroad Association of St. Louis* v. *Brotherhood of Railroad Trainmen*, 318 U. S. 1, when it held that the Adjustment Board was not vested by the Railway Labor Act with regulatory authority within the field of wages, hours, and working conditions in the railroad industry, so as to exclude regulatory action by a state commission within that field. In a unanimous opinion it was said:

> "The Railway Labor Act, like the National Labor Relations Act, does not undertake governmental regulation of wages, hours, or working conditions. Instead it seeks to provide a means by which agreement may be reached with respect to them. The national interest expressed by those Acts is not primarily in the working conditions as such. So far as the Act itself is concerned these conditions may be as bad as the employees will tolerate or be made as good as they can bargain for. The Act does not fix and does not authorize anyone to fix generally applicable standards for working conditions. The federal interest that is fostered is to see that disagreement about conditions does not reach the point of interfering with interstate commerce. The Mediation Board and Adjustment Board act to compose differences that threaten continuity of work, not to remove conditions that threaten the health or safety of workers." (at p. 6).

Since Congress did not commit to the Adjustment Board any statutory standard requiring uniformity of application, there is no basis for presuming that Congress intended to vest the Board with an exclusive jurisdiction of the kind which under the primary jurisdiction doctrine is thought to be necessary to insure uniformity in the maintenance of a statutory standard. As this Court expressly held in the *Terminal Railroad Association Case*, "The enactment by Congress of the Railway Labor Act was not a preemption

of the field of regulating working conditions themselves," and therefore action by a state commission exercising administrative powers to regulate conditions within that field was not excluded. For the same reason, exercise by state courts of judicial powers to regulate and adjudicate relations between citizens of the state growing out of a contract between them should not be excluded—as it would be if the *Moore Case* is overruled or if this respondent is not permitted to maintain this suit—by the fact that a dispute submitted to the state courts for such adjudication is one which might have been, but had not been, submitted to the Adjustment Board.

From all of the above considerations it follows that the primary jurisdiction doctrine has no application with respect to the National Railroad Adjustment Board, since the reasons on which that doctrine is founded do not exist in the case of the Adjustment Board.

IV. The Legislative History Confirms and Supports the Decision in the Moore Case, and Shows That Congress Did Not Intend by the Creation of the Adjustment Board to Effect a Complete and Radical Change in the Character and Legal Effect of the Adjustment Procedure for Handling Railway Labor Disputes.

For this Court now to overrule the *Moore Case* and hold that neither party to a dispute over which the Adjustment Board has authority may have recourse to the courts before the submission of the dispute to the Board would be to hold, as this Court has said, that the adjustment "machinery provided for settling disputes was based on a philosophy of legal compulsion". *Moore v. Illinois Central R. Co.*, 312 U. S. 630, 635. It is submitted that the Court was right in deciding in that case that neither the language of the Act nor its legislative history indicated that anything more was intended by Congress than the establishment of a voluntary method of adjustment to which the parties could resort if they chose and which did not displace the ordinary jurisdic-

tion of the courts to adjudicate the dispute without prior submission to the Board. Reexamination of the Act in the light of its legislative history shows that this Court's conclusion in that respect in the *Moore Case* was correct.

The fact that by the Adjustment Board provisions of the Railway Labor Act of 1934 Congress effected certain modifications in the permissive procedure already embodied in the Transportation Act of 1920 and the Railway Labor Act of 1926 for the informal adjustment of disputes between carriers and their employees affords no basis whatever for a conclusion that it thereby intended to make judicial procedure for the determination of those disputes unavailable in the first instance. That the only object of Congress was to make such permissive machinery for informal adjustment more readily available and more useful, is clearly stated in the following language from the Report of the House Committee on Interstate and Foreign Commerce, in recommending for enactment the amendments of 1934 to the Railway Labor Act (House Report No. 1944, 73rd Congress, 2nd Session, pp. 2-3):

> "*The bill does not introduce any new principles into the existing Railway Labor Act*, but it is designed to amend that act in order to correct the defects which have become evident as a result of 8 years of experience. It does not change the methods of conference, mediation, and voluntary arbitration to settle major disputes over wages and working conditions, which are provided in the Railway Labor Act of 1926, now in effect."
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> "The Railway Labor Act of 1926, now in effect, provides that representatives of the employees, for the purpose of collective bargaining, shall be selected without interference, influence, or coercion by railway management, but it does not provide the machinery necessary to determine who are to be such representatives.
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> • • • • • • • • • •
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> "The second major purpose of the bill is to provide sufficient and effective means for the settlement of

> minor disputes known as 'grievances', which develop from the interpretation and or application of the contracts between labor unions and the carriers, fixing wages and working conditions. * * * This bill, therefore, provides for the establishment of a national board of adjustment to which these disputes *may* be submitted if they shall not have been adjusted in conference between the parties."

Certainly this language neither expresses nor implies any disparagement of the judicial process as applied to railway labor disputes. The most that the language can be made to mean is that the settlement of controversies by compromise or "adjustment" may be desirable and that facilities should accordingly be provided therefor. It says nothing, and implies nothing, that would limit the right to a judicial determination of legal issues as to collective bargaining contract rights which the parties are unable or unwilling to settle informally. The two processes, of informal adjustment on the one hand and legal determination on the other hand, had already long been recognized as separately and alternatively available at the time when the 1934 amendments to the then existing Railway Labor Act of 1926 were adopted. Adjustment boards in one form or another had been a feature of labor relations in the railroad industry since the first World War. Between 1920 and 1926 functions of this character had been vested in the so called Railway Labor Board established under Title III of the Transportation Act of 1920 (41 Stat. 469). Speaking of these functions and of their essentially different character from the judicial determination of a controversy, this Court said in *Pennsylvania Railroad* v. *Labor Board*, 261 U. S. 72, 84:

> "But Title III was not enacted to provide a tribunal to determine what were the legal rights and obligations of railway employers and employees, or to enforce or to protect them. Courts can do that. The Labor Board was created to decide how the parties ought to exercise their legal rights so as to enable them to cooperate in

> running the railroad. It was to reach a fair compromise between the parties, without regard to the legal rights upon which each side might insist in a court of law."

Thus this Court recognized and emphasized that there is a useful and important function to be performed in facilitating voluntary compromises and settlements between employees and employers, but that this is a different function from the adjudication and protection of legal rights. As the quoted passage points out, the protection of legal rights is the function of courts and not of the agency of adjustment. The fact that an agency of adjustment is established cannot, therefore, be construed as indicating any intention on the part of Congress to preclude resort to the courts and thereby prevent the enforcement and protection of legal rights.

There is nothing in the legislative history of the Railway Labor Act of 1934 to indicate that Congress thought it was effecting any revolution in its previous policy. In fact the House Committee in its report specifically stated that "the bill does not introduce any new principles into the existing Railway Labor Act." (House Report No. 1944, 73rd Cong., 2nd Sess., p. 2). On the contrary, it is clear from the reports of both the Senate and House Committees that the provisions of the present Act establishing the National Railroad Adjustment Board were designed simply to correct certain supposed defects in the provisions of the Act of 1926, including defects in the operation of the adjustment machinery. The Act of 1926 contained a provision which purported to require the carriers and their employees to establish an adjustment board or adjustment boards by agreement; but since alternatives were left open to permit the establishment of separate boards for each carrier or of regional boards or a single national board, the boards which were actually established covered only a portion of the nation's railroad system. Furthermore, the Act provided no effective method of handling cases to a conclusion where the members of a Board disagreed and a deadlock resulted.

It was for the purpose of meeting these supposed defects in the Act of 1926 that the Act of 1934 was enacted, according to the Report of the House Committee (House Report No. 1944, 73rd Cong., 2nd Sess. p. 3):

> "The present Railway Labor Act provides for the establishment of boards of adjustment by agreement. In many instances, however, the carriers and the employees have been unable to reach agreements to establish such boards. Further, the present act provides that when and if such boards are established by agreement, the employees and the carriers shall be equally represented on the boards.
>
> "* * * the boards have been unable to reach a majority decision, and so, the proceedings have been deadlocked. * * * This condition should be corrected in the interest of industrial peace and of uninterrupted transportation service. This bill, therefore, provides for the establishment of a national board of adjustment to which these disputes *may be submitted* if they shall not have been adjusted in conference between the parties. The provisions as to the national board of adjustment are as follows: * * *
>
> "(e) If any division of the Board should deadlock on a dispute, then the representatives on the Board will endeavor to select a neutral or impartial person; and if they are unable to agree upon the selection of such neutral person, then the United States Board of Mediation will appoint a neutral person. The dispute will then be again considered and a majority decision reached."

These were the principal and apparently the only changes which Congress had in mind in substituting the adjustment board provisions of the Act of 1934 for the provisions of the Act of 1926. It is significant that there appeared no intention whatever to affect or alter the provisions defining the nature and function of adjustment boards. The present Act establishes a National Board, since none had been established by agreement under the Act of 1926, but it still permits a carrier and its employees, or a group of carriers and their employees, to establish separate adjustment

boards by voluntary agreement (45 U. S. C. §153 Second) if they so desire, and where such a separate board is in existence, the National Board has no functions with reference to the disputes which are submitted to the separate board.[7]

The language of the Railway Labor Act of 1934 describing the functions of the National Railroad Adjustment Board (Section 3 First (i)) is borrowed practically verbatim from the language of Section 3 First (e) of the Act of 1926, with the single important difference that, whereas the Act of 1926 provided that, when an adjustment board had been set up by agreement, disputes "shall" be referred to the board, the Act of 1934, in referring to the statutory board, substitutes the permissive word "may." It is clear, as has been pointed out above (p. 29), that under the Act of 1926 the jurisdiction of the courts was unaffected by the adjustment procedure provided by that statute. By using completely parallel provisions in the two acts with respect to the functions and status of adjustment boards, it follows that Congress did not intend by the 1934 Act to substitute boards for the courts, or to require preliminary resort to an adjustment board as a prerequisite to recourse to the courts. Congress made this doubly sure when it substituted the permissive word "may" for the mandatory "shall" so as to make certain that reference to an adjustment board would be on a purely voluntary basis.

It is clear therefore that Congress did not intend by the 1934 amendments to the Railway Labor Act to give to the adjustment procedure for the settlement of railway labor disputes any effect or status different from that which it previously had. It is also clear that prior to the 1934 Act the adjustment procedure had not held such a status that preliminary resort thereto was a condition prerequisite

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[7] In its annual report referred to *supra*, note 6, the National Mediation Board recently urged the wide use of these separate boards as a means to relieve the critical backlog of cases on the docket of the Adjustment Board and possibly to prevent the breakdown of the Railway Labor Act (at p. 13).

to the right to bring a judicial proceeding in the courts. Not merely is there no evidence whatever of an intention on the part of Congress to make any change in this respect in the status of the adjustment procedure, but there is the strongest evidence of an express contrary intent, that is, an intent not to make any such change, in the statement quoted above from the House Committee's Report that the amendment "does not introduce any new principles into the existing Railway Labor Act."

Accordingly, it is clear that to construe the Act of 1934 as conferring exclusive jurisdiction on the National Railroad Adjustment Board would be to fly directly in the face of the legislative history of that Act and to affirm a Congressional intent which that history expressly denies.

V. The Decree of the South Carolina Court Leaves Petitioner Free to Exercise All Its Rights and Enjoy Its Privileges and Immunities Under the Railway Labor Act.

In petitioner's brief it is contended that the decree of the court below will have the effect of interfering with its rights of collective bargaining and other procedures for adjustment and settlement of disputes relating to interpretation and application of the collective agreement, because the decree purported to be a "final and binding declaration."

Petitioner complains that as a result of the decree "further efforts on the part of the petitioner to perform its statutory function to obtain a settlement of the dispute by negotiation must be abandoned not only in respect to this dispute but in respect to all 'similar' disputes that may arise in the future." (Bf., pp. 53-54).

This argument completely overlooks the basic difference between interpretation of an existing contract and the making of a new contract. Where a dispute exists over the interpretation of an existing contract, such a dispute must in the nature of things be settled some time, by some tribunal, by a "final and binding" decision. But such a decision does

not preclude petitioner from immediately bargaining with respondent for a change in the collective agreement as thus construed. Both the trial court and the court below expressly recognized the right of petitioner to seek a solution of its difficulties by undertaking to have the contract changed by following the machinery followed by law. In the decree itself, it is provided:

> "Of course, if the defendant is not satisfied with the present provisions of the agreement, it is free to initiate amendments or changes by following the procedure provided in the last paragraph of the contract, and undertake to secure the desired relief by the normal processes of collective bargaining." (R. 570)

Thus petitioner is just as free now as it was before the commencement of this suit to handle claims and grievances or claims on behalf of its members or nonmembers, for that matter, provided petitioner is duly authorized to do so by the employees concerned. In such cases, this respondent has always made every attempt possible to dispose of such matters informally through correspondence or conference. Petitioner can always appeal such grievances and claims up to the highest officer designated by respondent as provided in Section 3, First (i) of the Act, 45 U. S. C. § 153 First (i), just as was done in this case. However, when the dispute is not settled and the parties cannot agree on the proper interpretation of the applicable contracts, either party is free to take the dispute to a proper tribunal to secure authoritative and binding interpretations that will dispose of the grievance or claims. Obviously, the award or decree of such a tribunal does not infringe on any rights or immunities of petitioner under the Railway Labor Act, which had as one of its purposes the peaceful and final disposition of all disputes or controversies.

Petitioner also criticizes the findings of the trial court with respect to the adequacy of the Adjustment Board remedy. It should be kept in mind that the trial court only con-

sidered this point in connection with its consideration of whether or not *in its discretion* it should make a declaration under the authority given it by the South Carolina Declaratory Judgment Act.

While it is clear that this Court does not have before it for review the wisdom of the trial court in exercising its discretion as it did, we would like to point out that the record does fully support the finding that it would take several years to obtain a decision from the Adjustment Board, both by the testimony of qualified witnesses and the official reports of the National Mediation Board. (R. 197-202). Indeed the critical condition with respect to the First Division of the Board, which has jurisdiction over such cases as this, is commented on at some length in the Fifteenth Annual Report of the National Mediation Board, including the Report of the National Railroad Adjustment Board, for the fiscal year ended June 30, 1949, which was transmitted to Congress on November 1, 1949. It said in part (page 12):

> "The backlog of pending disputes continues to grow year after year. For example, the First Division docketed 1,226 new cases during 1949 while disposing of 731 cases. As a result the backlog grew from 2,347 cases at the beginning of the year to 2,842 as of June 30, 1949. Based upon the number of cases closed during the past year the Board had on hand at year's end nearly 4 years' work. Nor do these figures tell the whole story for with the prospect of such long delays in getting cases considered and settled by the First Division many organization representatives have withdrawn pending cases and have declined to submit any new cases until the situation is corrected and threaten frequently to use economic strength in disposing of the cases. For this reason the 2,842 docketed cases probably represent only a small fraction of the total number of such disputes pending settlement on the railroads of the country."

It is indeed surprising that petitioner should attempt to criticize the delay in securing the final judgment in the state courts in this case. It is true that the suit was filed

on July 12, 1945 and the final decree of the Supreme Court of South Carolina was handed down August 15, 1949. But most of this time is chargeable to the dilatory tactics of petitioner in attempting to forestall the trial court from taking jurisdiction in the first instance. Over a year and half were consumed in establishing the right to bring this suit under South Carolina law. The decree of the trial court was then entered on August 30, 1947 (R. 528) and the ensuing two years have been consumed in disposing of petitioner's appeal. It is thus seen that over three years of the time consumed is directly chargeable to petitioner, and that less than a year would normally be consumed in securing an authoritative decision by the South Carolina courts as against several years for an award of the Adjustment Board.

It is therefore clear that there is absolutely no substance to petitioner's argument that the declaratory judgment rendered by the South Carolina courts in the exercise of its discretion under the State Declaratory Judgment Act is in any way in derogation of petitioner's rights under the Railway Labor Act.

CONCLUSION.

For all the reasons and upon the authorities above set out, we respectfully submit that the judgment and decree of the South Carolina Supreme Court should be affirmed.

Respectfully submitted,

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